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# Bruce E. Holmes dba Holmes Realty v. DeGraff Associates, Inc. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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|---|---|---|
| BRUCE E. HOLMES, dba HOLMES REALTY, | ) | |
| Plaintiff-Appellant, | ) | Case No. 16549 |
| vs. | ) | |
| DeGRAFF ASSOCIATES, INC., | ) | |
| Defendant-Respondent. | ) | |

# BRIEF OF APPELLANT

Appeal from Judgment of the Third Judicial District Court of Salt Lake County, Honorable Ernest F. Baldwin, Judge

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FILED

DEC - 1 1979

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BRUCE E. HOLMES, dba HOLMES REALTY,

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vs.

DeGRAFF ASSOCIATES, INC.,

Defendant-Respondent.

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## TABLE OF CONTENTS



### Cases Cited





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## Statutes Cited



## Other Authorities Cited



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IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
|---|---|---|
| BRUCE E. HOLMES, | ) | |
| Plaintiff-Appellant | ) | District Court No. C-78-681 |
| vs. | ) | Supreme Court No. 16549 |
| DeGRAFF ASSOCIATES, INC., | ) | |
| Defendant-Respondent. | ) | |

# BRIEF OF APPELLANT

## NATURE OF CASE

Plaintiff-Appellant, Bruce E. Holmes (hereafter "Holmes"), brought an action claiming entitlement to a real estate commission for the sale of certain property owned by the defendant-respondent, DeGraff Associates (hereafter "DeGraff Associates"). Respondent asserted counterclaims based on breach of contract, fraudulent representation, and intentional and malicious false accusations. Trial was held May 16 and 17, 1979. The trial court awarded judgment on the complaint to respondent and to appellant on the counterclaims.

## RELIEF SOUGHT ON APPEAL

Appellant prays that the Court reverse the trial court's findings of fact, conclusions of law, and judgment insofar as Holmes was found not be entitled to the real estate commission, that the trial court be instructed to enter judgment in favor of Holmes in the amount of his portion of the real estate commission, and that Holmes be awarded his costs on appeal.

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## STATEMENT OF FACTS

During the months of May, June, and July of 1977, the period in which the dispute arose, Holmes and DeGraff Associates were both members of the Salt Lake Board of Realtors (hereafter "Board of Realtors" or "Board") (R. 3), a voluntary association of real estate brokers and sales agents, and both were members of the Board's Multiple Listing Service (sometimes referred to herein as "MLS")(Exhibits 3-P, 4-P, 10-P, 12-P, 15-P). This service provides a means by which members may submit "sell listings" for publication in the weekly MLS catalog and exposure to other members. Holmes and DeGraff Associates had signed agreements to be bound by the rules and regulations of the Board of Realtors (Exhibits 2-P and 12-P). Holmes and DeGraff Associates had each signed "commisson split" agreements with the Board of Realtors (Exhibits 3-P and 15-P). The commission split agreements provide for the manner or percentage of split between brokers of the comission earned upon sale of a property listed with the Multiple Listing Service. The agreements provide, in material part, that DeGraff Associates would pay a "selling broker" 60 percent of the commission upon the sale of a property listed by DeGraff Associates (Answer to Request for Admission No. 5, R. 75, Exhibits 3-P and 15-P).

The listing broker completes a form, entitled "Lots and Acreage Form," and submits it to the Multiple Listing Service for publication in the MLS weekly catalog. The form includes information regarding the location and size of the

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property, the listing broker, the asking price and terms, if any, and the amount of the commission.

A listing broker is one who negotiates a listing contract, entitled Sales Agency Contract, with the seller. The selling broker is the one who finds the buyer, introduces him to the property, generates an offer to purchase that property from the buyer or the client and then in turn presents that offer to the seller through the listing agent, ultimately concluding in the seller accepting the offer and the buyer and seller consummate the transaction accordingly.

When two brokers -- the listing broker and the selling broker -- are involved in a transaction which is consummated in the sale of the property, the sales commission as published in the listing agreement is split between the two brokers according to agreements submitted by them to the Multiple Listing Service (Tr. 7-8).

The agreements filed with the Board cover a situation between a broker who is selling the property as a principal and a broker who is buying the property as a principal (Tr. 12).

DeGraff Associates authorized Clara DeGraff to list certain property located in Salt Lake County and owned by DeGraff Associates (Tr. 47). DeGraff Associates signed a Sales Agency Contract authorizing the listing, offer for sale, and sale of certain property (hereafter the "property") located in Salt Lake County, owned by DeGraff Associates (Answer, paragraph 2, R. 7, in response to paragraph 3 of plaintiff's complaint). DeGraff Associates agreed to pay a six percent com-



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mission upon the sale of the property (Answer to Request for Admission No. 2, R. 74). The Sales Agency Contract was to expire on its terms September 18, 1977 (Tr. 61).

The Sales Agency Contract provides, in part:

> Should said property be sold, leased or exchanged within three months after such expiration to any party to whom the property was offered or shown by me or you, or any other party during the term of this listing, I agree to pay you the commission above stated.

Clara DeGraff completed the Lots and Acreage Form (see reserve side of Exhibit 9-P) and submitted it to the Multiple Listing Service for publication in the MLS catalog.

The multiple listing catalog of May 6, 1977, included as Entry No. 63,000, page 86 (Exhibit 7-P), the property concerned here, described as "206 +" acres in Kearns, at a total price of $1,421,170. Broker's commission was shown as six percent.

On May 13, 1977, DeGraff Associates signed a Non-Sale Agreement regarding the property which provides, in material part:

> In consideration of your agreement to remove the listing of my property, located at 5600 West 6200 South, 206 + acres of land, from the files of the Multiple Listing Service of the Salt Lake Board of Realtors, and its member offices, and your further agreement to withhold your efforts to secure a buyer for said property, I agree to pay you the commission as per listing contract in the event the said property is sold by myself, or any other person, firm or corporation.

Sometime toward the end of May, 1977, Holmes contacted Clara DeGraff, the licensed broker of DeGraff Associates, by telephone to inquire about the property listed by DeGraff Associates in the May 6, 1977 MLS catalog. Later, Holmes tele-

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phoned Clara DeGraff again and asked more specifically about the property. When questioned as to whether it was still available, Clara DeGraff testified that though it had been withdrawn from the market, there had been discussions with others who had called expressing an interest.

Holmes and Clara DeGraff negotiated regarding the terms of sale, which negotiations culminated in Clara DeGraff signing and delivering to Holmes, an Option (Exhibit D-24) dated June 17, 1977. Its terms included a total purchase price of $7,000 per acre for approximately 205 acres with $100,000 cash down on July 15, 1977 and $100,000 or more annually thereafter until paid in full, with interest on the unpaid balance at the rate of eight percent per annum. The option was for a period of seven days from its execution. Paragraph 8 of the option provides:

> The Seller recognizes HOLMES REALTY Real Estate Company (Broker and Agent) through its salesmen BRUCE E. HOLMES, as the Real Estate Broker with whom Seller listed this property for sale and Seller agrees to pay commission to said Broker equal to -0-% of the gross sales price; and Seller hereby authorizes the agent to withhold such commission from the proceeds of sale at time of closing.

The terms "Holmes Realty" and "Bruce E. Holmes" were typed onto the standard form. The term "-0-" was handwritten.

On the same day the option was signed, Holmes had conversations with Clara DeGraff and Jay DeGraff. Holmes testified regarding those conversations as follows:

> Q. What is the basis of your statement regarding their refusal to honor the option?



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A. From the very day that I obtained the option they told me they would not honor it and I don't think it was two or three hours after I got it signed that I got a call from Clara DeGraff waiting for me at my home and I called her up and talked to her about it.

Q. That was on the day of the option, June 17th?

A. That was on the day the option was signed.

Q. And what was the conversation?

A. That her husband had seen the option and that he was very upset about it and she was sort of in a bind and could I help her out, that her husband would not accept the terms of the option as it was written.

Q. What was your response?

A. My response was well, why don't I come out and we'll talk about it, don't get upset, we'll talk about it and see what the deal is, something to that effect.

Q. What was the next contact you had with DeGraff Associates?

A. I believe it was later on that evening and I can't pinpoint the exact day or time for certain but I talked with Jay DeGraff. I believe I talked with him and talked with him at home about the same subject matter ..., he ... told me that that option was not worth (sic) the paper it was written on, that his wife was not authorized to sign for the corporation -- I don't remember if he brought up the fact it was written in perpetuity or in subsequent conversation but it did come up from him and from the very day that I got the option they told me they would not honor it.

Q. Now you refer to perpetuity. What do you mean by that or what was meant by that?

A. Well, I didn't know for sure what it meant and I am still not entirely sure what it means. I think it means that there is no date that it is going to be paid off.

Q. Is that the term that Mr. DeGraff used?

A. Yes.

(Tr. 120-22)

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Clara DeGraff testified regarding the response of her husband, Jay DeGraff, upon reading the option:

Q. What did he say about the option?

A. He read it through and when he finished he said do you realize that this is -- that contract exercise of this option provides a contract that can never be paid out and he asked me how it came to be and I told him Mr. Holmes had prepared it and he said there would have to be some kind of changes in order for the -- so that eventually the contract would pay out.

Q. In fact he said he wasn't going to sell the property on that option did he not?

A. No, he did not.

MR. PETTY: Your honor, may the deposition of Mrs. DeGraff be published?

Whereupon the deposition of Clara DeGraff was published, and read as follows:

MR. PETTY: Well, let me begin on page 8. Bottom of page 8. Question, and I show you what is marked as Exhibit 21 which is attached to the deposition of J. DeGraff. Is that the option? Answer: It appears to be. Question: And was it signed by you on 17th of June, 1977? Answer: Yes. Question: What was the next communication that you had with Mr. Holmes? Answer: As soon as my husband came back to the office that afternoon and saw the option he was very upset with it and -- Question: What did he say? Answer: He wasn't going to sell that property under that type of an option and I told him what had transpired, that we tried to get a hold of him and had been unsuccessful and he said that under no circumstances would this type of an option or type of circumstance would go to fruition because of the nature of the option. I called Mr. Holmes and told him that. Was that your testimony that day?

THE COURT: Yes, that was her testimony. This is a deposition, it has been signed and filed so that was her testimony. That is how she testified at that time.

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Q. Was that true?

A. Yes.

(Tr. 93-94)

Holmes assigned the option to American Equity Corporation (Tr. 43), which retained Holmes to complete negotiations and consummate an agreement with DeGraff Associates (Exhibit 38-P) in behalf of American Equity.

American Equity Corporation requested Holmes to exercise the option (Exhibit 37-P). American Equity Corporation subsequently assigned its interest in the Option to its affiliate, American Development Company.

Holmes exercised the option in accordance with its terms by sending DeGraff Associates a letter dated June 23, 1977 (Ex. 25-D). Upon receipt of the notice of exercise, Clara DeGraff called Holmes and expressed concern that Holmes intended to close on the option (Tr. 123). Holmes had several discussions with Jay DeGraff wherein Holmes attempted to negotiate a new agreement which would be satisfactory to DeGraff Associates (Tr. 122,123). The negotiations were unsuccessful. In a letter dated July 11, 1977, Holmes reiterated that he was exercising the option and set the closing date for July 14, 1977, at Security Title Company (Ex. 27-D). Between July 11 and 14, Holmes met with Jay DeGraff and Craig DeGraff in an effort to negotiate an agreement satisfactory to DeGraff Associates (Tr. 124). During this time, from June 17 to July 14, Jay DeGraff consistently refused to honor the option and told Holmes the option was not worth a thing (Tr. 125). Holmes had



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a conversation with counsel for DeGraff Associates regarding the validity of the option:

Q. The question again was what was said about the option and by whom, would you tell us the conversation and who said what with regard to the option.

A. Mr. Sabin outlined several reasons why that option was not valid. The one that remains in my mind is that it was written as he called it in perpetuity and he explained to me what that meant a little bit. He also mentioned several other reasons and I don't think I can itemize those but there was -- there were about four or five reasons all together why he considered that option invalid as written and therefore, the DeGraffs could not be held to it. That is what he was telling me.

(Tr. 147-48)

As to his view of the legal effect of the option, Jay DeGraff testified:

Q. What was your personal position on behalf of -- well, with respect to whether or not you considered that option binding prior to the time that the closing of the sale actually took place?

A. We never had any questions as to whether we had a binding agreement with the option and that it would culiminate in a final contract which would negotiate transfer of title.

Q. Now, there are differences, are there not in some of the terms of the final contract of sale under the option?

A. As has been testified, Mr. Sabin, I picked up on the fact that we had a contract here that was never going to be paid out because the interest alone.

. . .

Q. What was your understanding, Mr. DeGraff as to the document that was being utilized for purposes of closing the sale?

A. The option was a bona fide document, a binding agreement and we kept going on with the negotiations in pursuit of it.

(Tr. 131-32)

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On cross examination, Mr. DeGraff testified further regarding the option:

Q. Mr. DeGraff, did you consider that there was a requirement for a subsequent contract of sale after the option was signed?

A. I considered the option to be an ongoing, leading to a contractual passing of title.

Q. You considered that the terms of the option had to be expanded, clarified or redefined or renegotiated?

A. That has been said repeatedly. We talked about that.

Q. I am asking you if that was your treatment, your attitude for this option?

A. Certainly was. The option was binding with the exception of the fact that we had something that was never going to be paid off here.

Q. And that wasn't binding?

A. Well, how can you have a contract that doesn't have an end to it?

Q. That is what I am asking of you. Can you or can't you?

A. Well, you can't --

(Tr. 138-39)

On July 14, 1977, Holmes wrote a letter (Exhibit 29-D) as follows:

> This is not the contract that I had ready for the "closing" at 3 P.M. according to the terms expressed in the option you granted to me. However, as you have expressed a desire to make changes in the terms but haven't yet given me any specific suggestions, I'm submitting this contract as an alternative which I believe will be satisfactory to the both of us.

This letter was delivered to DeGraff Associates by Bruce Holmes, together with a form of contract which showed American Development Company as buyer (Tr. 127).

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Holmes and Glen Saxton of American Development Company appeared at the closing scheduled for July 14, 1977. No one from DeGraff Associates attended. That afternoon in a conversation with Craig DeGraff, the terms of an agreement were negotiated by DeGraff Associates and American Development Company, through Craig DeGraff and Bruce Holmes, respectively (Tr. 113). DeGraff Associates executed the purchase agreement at Security Title Company on the following day, July 15, 1977.

The terms of that Agreement between DeGraff Associates and American Development Company (Exhibit 17-P) provides for a purchase price of $1,435,000, $74,500 paid concurrent with the execution of the agreement and the balance of $1,360,000 as follows:

> $50,000 on or before July 31, 1978; $50,000 on or before September 30, 1978; $50,000 on or before July 31st of each year thereafter and $50,000 on or before September 30th of each year thereafter, until balance due Seller is paid in full.

In addition, American Development Company agreed to assume and pay the underlying contract to Farnsworth and Associates, DeGraff Associates' contract seller. Reference is made to the agreement for other terms.

Executed concurrently with the Agreement (Exhibit 17-P) were several other documents: Assignment of Contract (Exhibit 19-P), Supplemental Agreement (Exhibit 21-P), Escrow Instructions (Exhibit 20-P), Warranty Deed (Exhibit 18-P), and a Seller's and Buyer's Escrow Statement (Exhibit 22-P). The Seller's Escrow Statement (Exhibit 22-P) was the only one of these documents to refer to the broker's commission. It is a



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standard form, itemizing Buyer's deductions from the total selling price. One of these itemizations reads, "Real Estate Commission Due" with a blank space for the name of the broker and another blank space for the sum. In the first blank space was typed "Holmes Realty," and in the second "in arbitration."[1] This statement was signed by J. W. DeGraff.

The property listed by DeGraff Associates was sold to American Development Company within the term of the Sales Agency Contract (Answer to Request for Admission No. 3, R. 74,

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[1]On July 12, 1977, Holmes wrote to the Salt Lake Board of Realtors (Exhibit 31-D), requesting arbitration of Holmes' claim for a commission. DeGraff Associates was provided a copy of Holmes' letter and responded to the Board of Realtors (the record does not contain the response, but it is referred to in Exhibit 30-D). Holmes responded to DeGraff Associates by letter dated July 20, 1977 to the Board of Realtors (Exhibit 30-D). Holmes sought to pursue the matter by arbitration, but DeGraff Associates would not agree to binding arbitration (Tr. 90) and would not sign the Arbitration Agreement (Exhibit 32-D) of the Board of Realtors (Tr. 91).

Prior to amendment of §78-31-1, U.C.A., in 1977 which allowed agreement "to submit to arbitration any controversy which may arise in the future," an agreement to arbitrate a future dispute was unenforceable. Latter v. Holsum Bread Co., 108 U. 364, 160 P.2d 421 (1945), Shumaker v. Utex Exploration Co., 157 F.Supp. 68 (D. Utah 1957).

Section 4 of Article VI of the Multiple Listing Service Rules and Regulations (Exhibit 6-P) reads, in part, as follows:

> Section 4. An Arbitration Committee of nine members shall be appointed by the Directors pursuant to the Constitution and By-Laws of the Board. This committee will arbitrate disputes between members . . .

The agreements of Holmes (Exhibit 12-P) and DeGraff Associates (Exhibit 2-P) to abide by the Rules and Regulations of the Multiple Listing Service were signed before the effective date of the Amendment to §78-31-1.



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Ex. 17-P, Tr.61). American Development Company has performed all of its obligations under the Real Estate Contract (Tr. 52). Holmes introduced American Development Company to the property (Tr. 32, 57). The Agreement (Exhibit 17) between DeGraff Associates and American Development Company was negotiated by Bruce Holmes (Tr. 34). All of American Development Company's information regarding the property was through Bruce Holmes (Tr. 35).

## ARGUMENT

### POINT I. DeGRAFF ASSOCIATES REPUDIATED THE OPTION.

The Option was signed by Clara DeGraff on June 17, 1977. On the same day, just hours after the Option was signed, Clara DeGraff called Holmes and told him that DeGraff Associates would not abide by the Option as written (Tr. 93, 94, 121). Later that same day, Holmes had a conversation with Jay DeGraff during which Jay DeGraff told Holmes that the "option was not worth the paper it was written on, that his wife was not authorized to sign for the corporation" (Tr. 121). Holmes attempted to negotiate a new agreement with DeGraff Associates, during which time Jay DeGraff consistently refused to honor the option and told Holmes it was not worth a thing (Tr. 122, 123, 125). Counsel for DeGraff Associates told Holmes that the Option was not valid as written and that DeGraff Associates could not be held to it (Tr. 147-48).

DeGraff Associates repudiated the option. Repudiation is the refusal to perform a duty or obligation owed to the



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other party. Pitcher v. Lauritzen, 18 U.2d 368, 423 P.2d 491 (1967).

DeGraff Associates' repudiation was clear and unequivocal -- it refused to perform on the terms and conditions of the Option as written. "[R]epudiation, where it is an express refusal to perform, must be positive and unequivocal." Simpson, Contracts, 387 (2d Ed. 1965). The repudiation could not have been more clear, especially when measured against the Utah standard as announced in University Club v. Invesco Holding Corp., 29 U.2d 1, 504 P.2d 29 (1972).

The trial court entered a Finding of Fact as follows:

> 10. At all times from the date of execution of the Option Agreement until the date of final sale of the subject property, the Plaintiff considered and treated the Option Agreement as enforceable in effect and binding upon the Defendant. (R. 85)

It is irrelevant how Holmes regarded the Option; DeGraff Associates regarded it as unenforceable and repudiated it. Upon the repudiation, Holmes was entitled to certain legal rights (See Point II), regardless of how he regarded the Option.

The repudiation of the payment terms constituted a repudiation of the entire Option:

> Where the breach is by express repudiation, such as a refusal of any further performance, not only is it total but also it cannot be treated as partial by the promissee in obtaining a judgment. ... An express repudiation of the contract by the promissor is a single and total breach, and the promissee if he sues must claim the value of the entire contract in his action or the part not claimed is lost to him ... But if the circumstances accompanying the breach indicate that the promissor intends to render no further performance, then if the promissee sues at all he must recover all his damages for the entire contract in one action. Simpson, Contracts §188 (2d Ed. 1965).



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Corbin describes the rights of an option holder as follows:

> [T]he holder of an option to buy land has a conditional right to a conveyance, a power to turn that right into an unconditional right to immediate conveyance by performing the conditions, an immunity from revocation by the option giver, and the legal privilege of performing or not performing the conditions at his option. During the agreed term of his option, he has a right that the option giver shall not repudiate or make performance impossible or more difficult by conveying the land to a third person. These rights are enforceable by all the usual judicial remedies, including judgment for damages, injunction, and decree for specific performance. Corbin, Contracts §272 p.579.

See also Knight v. Chamberlain, infra, footnote 3, p. 30.

The rights of an option holder include the right to sue for damages for wrongful repudiation, even though the option was not exercised prior to the breach. Saltman v. Dunham, 406 P.2d 153 (Ore. 1965); Fullington v. Penn Phillips Company, 395 P.2d 124 (Ore. 1964).

Repudiation may or may not embrace the entire contract. It does so only if the part repudiated is material to the undertaking. A refusal to perform is obviously material. More specifically, DeGraff Associates repudiated the payment terms. The payment terms of the Option were of such a substantial nature that repudiation of those alone amounted to a substantial, material breach.

In Pitcher v. Lauritzen, 18 U.2d 368, 423 P.2d 491 (1967), the court was asked to order specific performance of an earnest money agreement for the sale and conveyance of land. The court was concerned with the ambiguity of the terms of the earnest money agreement, most particularly the manner of pay-



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ment. The importance of payment terms to a contract is apparent from the Court's refusal in Pitcher to order specific performance where the payment terms were uncertain. There was no uncertainty of terms in the Option, but it is equally clear that there could be no Option without terms of payment, which DeGraff Associates sought to avoid and expressly stated it would not abide by.

In Bentzen v. H. N. Ranch, Inc., 320 P.2d 440 (Wyo. 1958), the parties had agreed that the balance payable in a land sale was to be determined by future agreement. It was asserted that the matter of payment was a mere detail. To this the court rejoined:

> As indicated by our numerous citations, we do not deem this so; and the question of the method of making deferred payments seems to be even more compelling in a sizable transaction wherein the method of amortization, the time to be consumed thereby, and the interest to be paid, are, from a practical standpoint, important and often controlling features.

The court affirmed the trial court's determination that indefinite terms of payment resulted in an incomplete and unenforceable contract. Utah courts recognize one exception to this general rule, that is, when it is used not "as a shield to protect a party from injustice, [but] ... as a weapon with which to perpetrate an injustice." Kier v. Condrack, 25 U.2d 139, 478 P.2d 327, 330 (1970). In Kier the seller refused to perform an option contract on the grounds that it was uncertain and unenforceable in that payment terms were to be negotiated. The court held the option enforceable and made much of the seller's insistence on (1) an installment contract where

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sellers would retain title and possession for 24 months, or (2) full payment with free rental for seller's family for 24 months, while rejecting full payment without 24 months' free rental.

The conduct of the seller in Kier resembles DeGraff Associates' here: both sought to avoid performance. Just as the Kier court refused to allow the seller to capriciously invoke a legal rule in order to avoid a contract he no longer found desirable, so this court should find in DeGraff Associates' repudiation an assumption of the consequences of its wrongful behavior. A party must accept the risk of its misdeeds. Here that risk was that the repudiation would be accepted, resulting in rescission of the Option and all the terms thereof.

If the Option is otherwise valid (see Point V), DeGraff Associates' repudiation gave Holmes several alternative remedies (see Point II, p. 18).

It would indeed be anomalous to allow DeGraff Associates to negate the Option because of its objection to an essential term and yet maintain that the Option is enforceable in other respects. A contract shorn of its payment terms is unenforceable in its entirety. Here the fatal indefiniteness was caused or contributed to by DeGraff Associates' own actions. Defendant should not be entitled to assert the validity of Holmes' alleged commission waiver after having repudiated the Option due to payment terms it found to be disadvantageous.

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POINT II. THE REPUDIATION OF THE OPTION WAS TREATED AS AN OFFER FOR MUTUAL RESCISSION; THE OFFER WAS ACCEPTED AND THE OPTION WAS DISCHARGED BY A NEW AGREEMENT.

DeGraff Associates was given several opportunities to retract or withdraw the repudiation and perform the Option according to its terms. Rather than do so, DeGraff Associates consistently and unequivocally refused to perform according to the terms of the Option.

The innocent party to a repudiated contract has several alternative remedies. Simpson says of these:

> Upon advance repudiation, there are four alternatives open to the promissee: (1) to sue at once for anticipatory breach; (2) to treat the repudiation as an offer for mutual rescission and accept it and discharge the contract; (3) to treat the repudiation as excusing his own further duty of performance and wait to sue until the breach has become an actual one; (4) to ignore the repudiation and urge the promissor to perform. The promissor may retract his repudiation up to the time the promissee has elected any one of the first three alternatives, but not after. L. Simpson, Contracts §194 (2d ed. 1965).

American Development Company chose the second alternative by proposing alternative terms and ultimately entering into a new contract with DeGraff Associates. American Development Company changed its position by proposing and entering into a new agreement. DeGraff Associates was then precluded from retracting its repudiation.

Simpson indicates the manner in which a contract may be discharged:

> A contract may be discharged by the substitution of a new contract.
>
> This results (a) By expressly substituing the new contract for the old one.

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(b) By making a new contract inconsistent with the old, with new terms on both sides agreed upon.

(c) By novation, in which a new party is substituted for one of the original parties by agreement of all three.

Simpson, Contracts, §206 (2d ed. 1965)

For a contract to be discharged by a new contract, the intention to discharge must be evident. The intention of discharge is determined from the inconsistency of the new terms with the old ones. Simpson, Contracts, §206, p.416. The intention of discharge, as with other terms of a contract, should be determined by what the parties intend, perhaps more generally. That is, DeGraff Associates' intention was to have a contract which, by its terms, paid out. DeGraff Associates' expressed intention was not to perform or honor the payment terms of the Option, which could extend perpetually. Having clearly repudiated an essential term, and thus the entire Option (see Point I), DeGraff Associates intended to enter into a new agreement. This intention is also evident from the inconsistency of the new terms with the old ones (see Point IV, pp. 24-27).

Since the Option was repudiated in its entirety, all of its terms became a nullity; the agreement between DeGraff Associates and American Development Company was contained in the Purchase Agreement (Exhibit 17). There is no waiver of Holmes' right or claim to a commission in the purchase Agreement or any of the documents executed simultaneously there-

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with. Holmes could not be bound to any terms of an Option which had been repudiated. Holmes was, therefore, entitled to sixty percent of the total commission by virtue of the agreements of Holmes and DeGraff Associates with the Multiple Listing Service of the Board of Realtors.

POINT III. THE PURCHASE AGREEMENT AND THE DOCUMENTS EXECUTED CONCURRENTLY THEREWITH CONTAINED THE PARTIES' ENTIRE AGREEMENT; ALL PRIOR NEGOTIATIONS OR AGREEMENTS MERGED INTO THE FINAL CONTRACT DOCUMENTS.

A new agreement was negotiatied between DeGraff Associates and American Development Company. The documents which embodied the agreement include: Purchase Agreement (Exhibit 17 P), Assignment of Contract (Exhibit 19-P), Warranty Deed (Exhibit 18-P), Escrow Instructions (Exhibit 20-P), and a Seller's and Buyer's Escrow Statement (Exhibt 22-P). These documents contained the parties' entire agreement, superceding and extinguishing all previous negotiations or agreements. This is the rule in Utah and has been stated in cases such as J. Henry Jones Company v. Smith, 27 U.2d 225, 494 P.2d 526 (Utah 1972), wherein the Court said:

> Where parties have discussed a business transaction and pursuant thereto have reduced an agreement to writing, it is generally to be assumed that their agreement is encompassed in the written document. 494 P.2d at 528.

See also Mawhinney v. Jensen, 232 P.2d 769 (Utah 1951).

In National Surety Corp. v. Christiansen Bros., Inc., 29 U.2d 460, 511 P.2d 731 (1973), this Court stated:

> [W]here parties engage in negotiations concerning a transaction, pursuant to which they enter into a written contract, it is presumed that all matters relating to the



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subject are merged in and constitute a complete integration of their agreement. 511 P.2d at 733.

Paragraph 10 of the Agreement (Exhibit 17) provides: "It is understood and agreed that there are no representations, covenants, or agreements between the parties hereto except as herein specifically set forth." The rule of merger or integration is particularly applicable when the final contract recites that it contains the entire agreement of the parties. Section 228, Restatement, Contracts, states:

> An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted.

In Bullfrog Marina, Inc. v. Lentz, 28 U.2d 261, 501 P.2d 266 (1974), the Supreme Court of Utah stated the manner in which a question of integration is determined:

> An essential element of an integration is that the parties shall have manifested assent not merely to the provisions of their agreement but to the writing or writings in question as a final statement of their intentions as to the matters contained therein. Whether a document was or was not adopted as an integration may be proved by any relevant evidence.
>
> Whenever a litigant insists that a writing that is before the court is an integration and asks the application of the parol evidence rule, the court must determine as a question of fact whether the parties did in fact adopt a particular writing or writings as the final and complete expression of their bargain. In determining the issue of the completeness of the integration in writing, evidence extrinsic to the writing itself is admissible. Parol testimony is admissible to show the circumstances under which the agreement was made and the purpose for which the instrument was executed. (Footnotes omitted.)

The court in Tapper Chevrolet Company v. Hansen, 510 P.2d 1091 (Ida. 1973), emphasized the importance of a merger clause and elaborates upon its effects.

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> Where an agreement is reduced to writing in such terms as to express a complete, integrated contract, evidence of a prior or contemporaneous oral agreement relating to the same subject matter is inadmissible to vary, contradict, or enlarge the terms of the written contract. (Citations omitted.) Where preliminary negotiations culminate in an integrated written agreement, the writing supercedes all previous understandings. Id. at 1094.

In Tapper, as here, the disputed agreement was a contract for the sale of land. The rule enunciated in Tapper worked to exclude evidence of a prior oral agreement. Evidence of a prior written agreement may also be excluded, whereas, evidence of contemporaneous written agreements is not excluded by this rule. Specifically, a contract of sale and escrow statements executed concurrently should be read together as one contract. Hays v. Hug, 412 P.2d 373 (Ore. 1966); Swanson v. Thurber, 281 P.2d 642 (Cal. App. 1955); Leiter v. Sandelsman, 270 P.2d 563 (Cal. App. 1954).

In the case at bar the purchase Agreement was accompanied by a Seller's Escrow Statement signed by DeGraff Associated, wherein it was stated that the broker's commission was in arbitration. Evidence as to the arbitration agreement, being contemporaneous and written, is not excluded by the parol evidence rule; on the other hand, evidence of the Option that no commission was due and owing is excluded for the reason that the entire agreement was merged into the purchase Agreement (Exhibit 17-P) and the documents executed contemporaneously therewith.

Even assuming that the presumption of a merger could be rebutted, the Option would nevertheless be ineffective to



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bar recovery of commisson for the reason that the so-called waiver provision was modified by the arbitration provision of the purchase Agreement and related documents. Holmes' basis for claiming a commission was not the reference to "arbitration" in the Seller's Escrow Statement, but rather his agreement, together with the agreement of DeGraff Associates, with the Multiple Listing Service.

The new agreement also precludes the introduction of evidence as to the old agreement. In Corporation Nine v. Taylor, 30 U.2d 47, 513 P.2d 417 (1973), the Court upheld a lower court ruling that the purchase price as it appeared in the contract of sale precluded the introduction of evidence that the agreed upon price was something different. The Court predicated the correctness of this result on the parol evidence rule, a rule which in the case of modification can be seen as a bar to the introduction of evidence as to terms which in the new contract has replaced those of the old.

DeGraff Associates considered the Option only preliminary to the negotiation of a more detailed agreement (Tr. 131-32, 138-39). The documents signed at closing established an arrangement where DeGraff Associates would not be required to perform any further act so long as American Development Company made the payments outlined in the Agreement (Exhibit 17-P). The Agreement referred to the escrow to be established and to DeGraff Associates' delivery of a Warranty Deed to the escrow agent. Further, the Agreement recited that it constituted the entire agreement between the parties. The integrated agreement


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of the parties, consisting of the purchase Agreement (Exhibit 17-P) and the documents executed simultaneously therewith, superceded the Option. The integrated agreement does not contain a waiver of a commission by Holmes. In absence of a waiver, Holmes is entitled to sixty percent of the commission, based upon the agreements with the Multiple Listing Service of the Board of Realtors.

POINT IV. THE OPTION WAS RESCINDED AND DISCHARGED BY THE NEW AGREEMENT.

DeGraff Associates repudiated the Option (see Point I above). Thereafter, DeGraff Assocates required and entered into an Agreement inconsistent with the terms of the Option. The only consistent term was that the same land was the subject of the Option and the Agreement. The total purchase price was possibly the same, but was expressed in different terms.[2] The Agreement, and documents signed concurrently therewith, provided the following terms or provisions, not mentioned in the Option: (1) establishment of escrow, (2) payment into escrow, (3) delivery of deed to escrow, (4) par-

---

[2]The Option (Exhibit 24-D) provided: "$7000 per acre" and described the property as "Approx. 205 acres." The purchase Agreement (Exhibit 17-P) provided: "... Buyer does hereby purchase the property above described for the total purchase price of ONE MILLION FOUR HUNDRED THIRTY-FIVE THOUSAND AND no/100 DOLLARS ---- ($1,435,000.00) which amount shall be reduced by $7,000 per acre if actual surveyed acreage is less than 205 acres ..."

It is further of note that the purchase price exceeded the listing price, $1,421,170 (see reverse side of Exhibit 9-P; Exhibit 7-P), by nearly $14,000.

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tial conveyance, (5) payment to Farnsworth Associates, DeGraff Associates' contract seller, by American Development Company, (6) final payment on or before September 30, 1985, (7) DeGraff's obligation to pay off The Lockhart Company, to which DeGraff Associates had assigned its contract with Farnsworth Associates, (8) authority to subdivide, install roads, curbs, gutters, sidewalks, sewers and other improvements, and (9) default provision.

In addition, several terms were changed. The Option provided for interest at eight percent per annum on the unpaid principal; the Agreement, five and three-fourths percent. The Option provided for a down payment of $100,000; the Agreement $75,000, plus the payments due Farnsworth and Associates, $72,164 on or before September 1 (see Exhibit 36-P). The option provided for annual payments of $100,000; the Agreement provided for payments of $50,000 each on or before each July 31 and September 30 of each year, plus $72,154 due Farnsworth and Associates annually on or before September 1 on the contract between Farnsworth and Associates and DeGraff Associates (Exhibit 36-P).

There can be no question from the foregoing comparison that the terms of the Agreement are inconsistent with the Option. The clear intention of the parties, comparing the Option to the Agreement, is to rescind the Option in favor of the Agreement. The law on rescission by making a new contract is summarized in 17 Am.Jur. 2d, Contracts §493:

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An agreement to rescind need not be express. Thus, a contract may be discharged before breach by the mere making of a new agreement or by the performance thereof, depending upon the intent of the parties. Similarly, after breach of the original contract the claim for damages may be discharged by the performance of a new agreement or by the mere making of a new agreement, where that is its meaning, or by the acceptance of benefits under the new contract. So, the general rule is well settled that the parties to a contract may rescind it by making a new contract inconsistent therewith. Primarily, however, it is a question of intention to be ascertained from the contracts themselves as to whether the earlier contract is dissolved and superceded by the new contract. If the parties to a contract make a new and independent agreement concerning the same matter and the terms of the latter are so inconsistent with those of the former that they cannot stand together, the latter may be construed to discharge the former. A new contract between the same parties which contains nothing inconsistent with an older one does not discharge the latter. Nor does the mere recital of a prior agreement in a later one extinguish the earlier agreement.

Where the new contract is consistent with the continuance of the former one and only provides a new mode of discharging the former one, it has no effect unless or until it is performed. Whether the second contract is deemed invalid for want of consideration or is regarded as an accord without satisfaction, its nonperformance leaves the parties with their former rights and liabilities unaffected. Moreover, where parties enter into a contract which, if valid, would have the effect, by implication, of rescinding a former contract and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights in respect of the former transaction. (Footnotes omitted; emphasis added.)

Further, a contract may be rescinded by acts or conduct of the parties. As stated in 17 Am.Jur. 2d, Contracts, §494:

A contract may be rescinded or discharged by acts or conduct of the parties inconsistent with the continued existence of the contract, and mutual assent to abandon a contract may be inferred from the attendant circumstances and conduct of the parties. There is authority to the effect that event a contract under seal may be released, surrendered, or discharged by matters in pais.

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> While as a general rule a contract will be treated as abandoned or rescinded where the acts and conduct of one party inconsistent with its existence are acquiesced in by the other party, to be sufficient the acts and conduct must be positive and unequivocal. A contract cannot be regarded as abandoned if both parties in good faith continue to assert contrary rights arising out of a diversity of opinion as to its construction.

The intent of DeGraff Associates was to rescind the Option in favor of the purchase Agreement. This intent is derived from the inconsistent terms of the Agreement when compared to the Option. In addition, DeGraff Associates considered the Option only preliminary to the negotiation of a final agreement (Tr. 131-32, 138-39). Upon repudiation of the Option, Holmes, and thereafter his assignee, American Development Company, were entitled to sue for anticipatory breach. The claim for damages in such an action could be discharged by making a new agreement. In any event, the terms of the Agreement and the Option are so inconsistent that they cannot stand together; the Agreement, under such circumstances, must be construed to discharge the Option.

A related legal principle is rescission by abandonment. In King v. Firm, 3 U.2d 419, 285 P.2d 1114 (1955), Firm gave King a note and mortgage to secure payment of an obligation. Firm was unable to make the payments on the note as they became due. Another note and mortgage, to take the place of the first, and which included $346 of additional costs, was prepared and signed. However, the mortgage was never recorded and King was paid the amount due under the first note, and King released the first note and mortgage. The trial court found

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$346 was owing under the second note and mortgage. The Supreme Court of Utah reversed:

> Had the parties considered that the second note and mortgage, which was never recorded, were valid and subsisting instruments they would not have been described in the release by King of first note and mortgage, the debt of which the later instruments were supposed to have renewed, as "unused papers." The fact that the release was of the first note and mortgage and not the second after it was decided to pay off the debt they represented is further evidence of the intent and understanding of all the parties that the second note and mortgage were not valid instruments. The mortgage being unrecorded and there being no question of third parties' rights here, there appears no logical reason why the parties could not mutually agree that those instruments, if valid in the first instance, should be cancelled or rescinded just as they would have been able to do in the case of an ordinary contractual obligation. See 12 Am.Jur., Contracts, Sec. 442, page 1024, where it is stated:
>
> > "It is sometimes said that a contract is considered to remain in force until it is rescinded by mutual consent or until the opposite party does some act inconsistent with the duty imposed upon him by the contract, which amounts to an abandonment, or that a contract will be treated as abandoned where the acts of one party inconsistent with its existence, are acquiesced in by the other. * * *"
>
> King by releasing the first mortgage and writing thereon that the sum paid included interest and payment of an attorney's fee for "unused papers" acted in a manner inconsistent with the existence of any rights under the second note and mortgage and thereby showed that he had abandoned any such rights which he may have had, and certainly the other parties acquiesced in this. We conclude therefore that the parties by their acts having mutually consented to abandonment of any rights under the later instruments, the court erred in finding that the balance of $346 was owing under those instruments ...

See also Pitcher v. Lauritzen, 18 U.2d 368, 423 P.2d 491 (1967).

The conduct of DeGraff Associates, and the terms of the Agreement when compared to the Option, compel the conclusion that DeGraff Assocates abandoned its rights, and liabilities, under the Option in favor of the Agreement and



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related documents. This abandonment of the Option was acquiesced in by the execution of the integrated contract, consisting of the Agreement and related documents.

The discharge of the Option discharges any waiver of Holmes' right or claim to a commission contained in the Option. In absence of waiver, Holmes is entitled to sixty percent of the commission, based upon the agreements with the Multiple Listing Service of the Board of Realtors.

POINT V. THE OPTION SHOULD BE RULED VOID AS A MATTER OF LAW

The Option contained terms which, if strictly followed, would never pay out the principal price. This Court has previously considered a case very similar to the present case. In Anderson v. Anderson, 15 U.2d 7, 386 P.2d 406 (1963), the parties entered into a conditional sales contract and escrow agreement, with a deed of conveyance deposited with the escrow agent. The payments under the contract would not pay the interest that accrued on the purchase price. The Supreme Court of Utah held that the escrow agreement was not void because of the rule against perpetuities. The decision is significant and, therefore, quoted at length:

> It is urged that the language constitutes an option to buy land. It appears only to be an option to make advance payments under the contract, and not to vest any title. It is unnecessary for us to decide what it is, since we are constrained to hold that the escrow agreement, taken as a whole, is not an option contract. ...
>
> It is urged further that the effect of the agreement was to create a perpetual lease, and is therefore void. We need not decide the point. ... [W]e think the contention advanced to be without merit.



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> Since we are dealing only with a contract for the sale of land upon performance of condition, it must be treated in that character in any assault upon it by the rule against perpetuities weapon, ...
>
> In the instant case we are not construing a deed or a conveyance. The deed is in escrow, under a conditional sales contract, looking toward delivery and resulting acquisition of legal title, by virtue of such deed "conveying * * * title to the * * * premises." The buyer at no time acquires any legal estate under the terms of the escrow agreement, and it is not an interest presently created to take effect at a time beyond the perpetuity period, and the sellers, until such time as the deed is delivered, well might for value convey the fee, subject to knowledge on the part of the grantee, in which case equities in defendant would arise, or lacking such knowledge, litigation would arise under the escrow agreement for breach.
>
> As to any argument that the agreement might give rise to an equitable interest, a point we need not decide, the simple answer is that admitting such urgence, such equitable interest would have arisen and become vested when the contract was executed, consequently eliminating any question of an equitable interest vesting in futuro.
>
> Since the escrow agreement does not purport to convey a legal interest presently, to take effect at a time offensive to the Rule, we conclude that the Rule is inapplicable.
>
> . . .

There are several distinctions between Anderson and the present case, although there are significant similarities. In Anderson, the primary agreement between the parties was a conditional sales contract.[3] An escrow was established

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[3]The distinction between an option and a conditional sales contract may be of minor import. In Knight v. Chamberlain, 6 U.2d 394, 315 P.2d 273 (1957), the plaintiff, a real estate broker, sued for services rendered, under an oral contract in connection with a proposed program for the development of residential properties. The plaintiff asserted that he was not subject to the provisions or requirements of Section 25-5-4(5), Utah Code Annotated, asserting that he undertook only to procure "options" which did not amount to "real estate" within the meaning of the statute. The court responded to that issue as follows: (Footnote 3 continued on following page.)

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and the seller deposited a warranty deed with the escrow agent. In the present case, we are dealing only with an Option, which provides for a date of possession and "final conveyance by Warranty Deed."

The rule against perpetuities is stated in Anderson as follows:

---

(Footnote 3 continued)

The question as to whether an option amounts to an interest in land is one upon which there is disagreement among the authorities. Some adhere to the view that it is merely a personal right in the optionee to call for and receive land if he elects to do so, dealing with which does not require a writing under the statute of frauds; others hold that an interest in land is created and such a contract must be in writing to be enforceable. ...

In approaching the question: whether an option amounts to an interest in land, the matter of primary concern is the nature of the right an option represents. Once the optionor has, for a good consideration, agreed to and signed an option, he is bound to sell his property if the optionee performs the conditions prerequisite to exercising it. Likewise, if he elects to do so, the optionee can perform, and then enforce his right to purchase and obtain conveyance of the property. Even before the option is exercised, the optionee can assert rights in the property by enjoining its sale to others. The rights and duties of the parties are thus seen to be closely analogous to those of buyers and sellers under conditional sales contracts, where land is to be conveyed upon performance by the buyer; and options have been so referred to.

There is, of course, a distinction between the optionee and the purchaser under an ordinary real estate contract, in that the optionee need not exercise his option, but can forfeit his payment and not perform; whereas the vendee under the contract is bound. However, this difference is in no way inconsistent with the idea that an option is essentially a right to purchase. Due to the fact that the optionee does have a degree of control over the property and the right to acquire it by performing certain conditions, logic seems to impel the conclusion that a valid option to purchase is an interest in real estate which would come within the terms of the above quoted portion of the statute of frauds. (Footnotes omitted.)



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No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest. Gray, Rule Against Perpetuities, 4th ed. 1942, 191.

In the present case, under the Option the Seller's obligation to make and deliver a Warranty Deed would not arise until the total purchase price is paid. Unless amounts were paid in excess of those amounts required by the Option, the purchase price would never be paid. Quite possibly, then, the Seller's obligation to make and deliver a Warranty Deed could arise after the period of lives in being plus 21 years.

Arguably, the Buyer's possessory and equitable interests vest within the period of lives in being plus 21 years. However, the legal interest, established by conveyance by warranty deed, may not be within that period and would thus appear to violate the rule against perpetuities.

In Morgan v. Griffith Realty Co., 192 F.2d 597 (10th Cir. 1951), the court was asked to consider the validity of an option to repurchase property, given under circumstances as though the language of option had been inserted in the deed of conveyance. Griffith purchased the land in question for $20,000.00. The warranty deed conveying the property to Griffith did not contain any restrictions, limitations or reservations in respect to the use or disposition of the property. Thereafter, Morgan requested a letter giving assurance that a theater building would be constructed on the land. In response, Griffith wrote a letter addressed to Morgan in which it was stated that the property had been purchased from him, that

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Griffith intended to build a theater on the property, and that if at any time in the future Griffith should abandon such intention, Morgan would be given the opportunity to repurchase the land at the cost to Griffith, $20,000.00. Approximately four years later nothing had been constructed on the property and Griffith received an offer of $50,000.00 for a portion of the property. Griffith desired to sell that portion. Morgan objected on the grounds that the letter constituted a valid option to repurchase the entire tract if Griffith decided not to erect the theater building and that a sale of any part of the land would constitute a breach of the option. In affirming the trial court's determination that the letter did not create any enforceable right, interest, option or a claim on the land, the Tenth Circuit stated:

> [T]he right to purchase was not presently vested. It could not be exercised until such time in the future as the intention to construct a theater building on the land was abandoned. And the abandonment of that intention might never take place. Manifestly, the right of exercise of the option was not presently vested; it was contingent; and it was without limitation as to time for its exercise. It extended for an indefinite time in the future. It might well extend beyond life or lives and being beyond 21 years. And it therefore contravened the rule against perpetuities, or restraint on alienation.

In reaching this conclusion, the Tenth Circuit stated: "The interdiction of perpetuities is not a rule of construction. It is a peremptory command of law founded upon a sound principle of public policy and is to be rigidly enforced."

The question of whether an option amounts to an interest in land or is merely a personal right (see Knight v. Cham-



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berlain, footnote 3 above) would not affect the result in Morgan v. Griffith Realty Co.

This Court should eliminate the types of uncertainties created by the contract in Anderson and the Option in the present case. DeGraff Associates and its counsel stated that the Option was unenforceable because of the violation of the rule against perpetuities; Holmes, perhaps in reliance on Anderson, or perhaps because as a layman he felt the parties should be bound to their agreement, asserted the validity of the Option. Just as this Court would hold that indefinite payment terms result in an unenforceable contract (Pitcher v. Lauritzen, supra), this Court should eliminate the indefiniteness created by a perpetual payment schedule and rule the same void as a matter of law, being in violation of the rule against perpetuities.

POINT VI. HOLMES IS ENTITLED TO SIXTY PERCENT OF THE REAL ESTATE COMMISSION DUE AND PAYABLE IN CONNECTION WITH DeGRAFF ASSOCIATES' SALE OF ITS PROPERTY

Whether characterized as repudiation (Point I), discharge (Point II), merger or integrated agreement (Point III), rescission (Point IV), or in violation of the rule against perpetuities (Point V), the facts of this case inescapably require the conclusion and finding that the Option was of no force and effect, and any waiver of Holmes contained therein was not binding upon him after the repudiation or the execution of the substituted purchase Agreement and related documents.

Holmes takes issue with a Finding of Fact entered by the trial court:



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13. At all times the Plaintiff's agreement was in effect whereby no commission would be payable from the Defendant to the Plaintiff in connection with the subject property. (R. 86)

This is really a conclusion of law, but nevertheless, as a finding or conclusion, is not supported by the evidence. The evidence is undisputed and overwhelming that the Option was repudiated, discharged or otherwise terminated and rendered void as a result of merger or integration, rescission, or the application of the rule against perpetuities.

DeGraff Associates agreed to pay six percent commission upon the sale of the property (Answer to Request for Admission No. 2, R. 74). The property listed by DeGraff Associates was sold to American Development Company within the term of the sales agency contract (Answer to Request for Admission No. 3, R. 74, Exhibit 17-P, Tr. 61). American Development Company has performed all of its obligations under the purchase Agreement (Tr. 52). Holmes introduced American Development Company to the property (Tr. 32, 157). The agreement (Exhibit 17) between DeGraff Associates and American Development Company was negotiated by Bruce Holmes (Tr. 34). All of American Development Company's information regarding the property was through Bruce Holmes (Tr. 35). In summary, Holmes performed all duties required of him to earn a commission.

Holmes and DeGraff Associates had each signed commission split agreements with the Board of Realtors (Exhibits 3-P and 15-P). The agreements provide that DeGraff Associates would pay a selling broker sixty percent of the commission upon

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the sale of a property listed by DeGraff Associates (Answer to Request for Admission No. 5, R. 75, Exhibits 3-P and 15-P). The sales price of the property was $1,435,000.00 (Exhibit 17-P). A commission of six percent of the purchase price is the sum of $86,100.00. Sixty percent of that amount is the sum of $51,660.00. Based upon the foregoing, Holmes is entitled to sixty percent of the commission, or the sum of $51,660.00.

## CONCLUSION

The Option was repudiated, discharged, rescinded, terminated by a final merged and integrated contract, or was void, being in violation of the rule against perpetuities. The rights, obligations, and liabilities of DeGraff Associates and Holmes under the Option were terminated or discharged. Holmes is entitled to sixty percent of the commission payable upon sale of the DeGraff Associates' property, the sum of $51,660.

It is respectfully requested that this Court reverse the judgment of the trial court with directions that judgment be entered in favor of Holmes in the amount of $51,660.

DATED this _____ day of November, 1979.

Respectfully submitted,
MOYLE & DRAPER

By _____
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CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of November, 1979, I served a copy of the attached Brief of Appellant by delivering a copy thereof to the following, or by mailing a copy thereof in a securely sealed, postage paid envelope to the following at the addresses indicated which are the last addresses known to me:

Neil R. Sabin, Esq.
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Salt Lake City, Utah 84103

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